Supreme Court, U.S.
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No. 96-915

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ASSOCIATED INDUSTRIES OF FLORIDA, INC. and PHILIP MORRIS, INC.,

Petitioners,

v.

AGENCY FOR HEALTH CARE ADMINISTRATION, STATE OF FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, AND STATE OF FLORIDA,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MELVIN SPAETH
Counsel of Record
MURRAY R. GARNICK
DAVID S. EGGERT
STACY J. POLLOCK
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

F. TOWNSEND HAWKES
500 First Florida Bank Tower
215 South Monroe Street
Post Office Box Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Petitioner, Philip Morris, Inc.

JODI CHASE, ESQ.
General Counsel
516 N. Adams Street
Tallahassee, Florida 32302
(904) 224-7173

Attorney for Petitioner, Associated Industries of Florida, Inc.

Of Counsel:

ARNOLD & PORTER
Washington, D.C.

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
Tallahassee, Florida

JODI CHASE, ESQ.
Tallahassee, Florida

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[1] Petitioners' Rule 29.6 listing of all parent companies and nonwholly owned subsidiaries is located at pages iii-iv of the Petition for Writ of Certiorari.

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Nothing in the opposition brief of Respondents (the "State") undercuts the significance of the fundamental constitutional issues at stake. The naked aim of the statute is an arbitrary sweep of billions of dollars from private parties into the State treasury. As noted by the three dissenting justices below, the statute eradicates affirmative defenses in all actions the State chooses to bring against any manufacturers whose products allegedly cause injuries resulting in Medicaid expenditures. Indeed, the State is currently pursuing such a multibillion dollar Medicaid reimbursement lawsuit against tobacco defendants.

The statute raises important due process issues that should be resolved by this Court. May a state abrogate common law defenses solely for its own litigation benefit? May a state, by fiat, transform worthless or nonexistent claims of Medicaid recipients into valuable state "reimbursement" claims?

Respondents fail to cite a *single* case where such special interest legislation designed to ensure a state's own victory against civil litigants has been sustained against constitutional attack. Instead, the bulk of the brief is devoted to an irrelevant rehashing of an argument that the State lost below concerning the pre-1994 meaning of the Florida Act (*i.e.*, before adoption of the Amendments challenged in this Petition). The State also recites various statutes and common law theories that it contends somehow excuse the State's blatant self-dealing. None of those cases—which do not even purport to discuss the constitutional issues central to this Petition—are even remotely similar to the Amendments. In sum, this Court should grant certiorari to examine and strike down the State's arbitrary, self-interested legislation.

I. THE STATE'S ARGUMENTS CONCERNING THE SCOPE OF THE 1990 AMENDMENTS ARE IRRELEVANT TO THIS PETITION, WHICH CHALLENGES THE 1994 AMENDMENTS, AND PROVIDE NO BASIS FOR DENYING CERTIORARI

The State fails to meet head-on Petitioners' constitutional challenge to its blatant self-dealing legislation. Much of the

Respondents' opposition brief presses an argument concerning the interpretation of the Florida Act that was rejected by the court below. (Opp'n at 1-10, 14-15, 19-20.) These arguments are irrelevant to whether Petitioners have presented an appropriate question for this Court to review.

After considering these same arguments, the Florida Supreme Court ruled that the 1994 Amendments created a new right of action on behalf of the State, including abrogation of affirmative defenses, that did not exist prior to 1994.[2] Even apart from the fact that the State's argument is wrong, it is difficult to see how the effective date has anything to do with Petitioners' challenge to the facial constitutionality of the Act or the appropriateness of certiorari.

II. THE AUTHORITIES RELIED UPON IN THE OPPOSITION FAIL TO SUPPORT THE CONSTITUTIONALITY OF THE AMENDMENTS

The State fails to cite a single case in which this Court or any other court has ever upheld as constitutional the sort of self-dealing central to the 1994 Amendments. Rather, it argues that the Amendments do *not* in fact establish special rules applicable only to the State, and strains to find analogies in statutes or common law doctrines irrelevant to the constitutional issues. The bottom line is that the legislation is an unprecedented example of governmental self-dealing and its propriety should be considered by this Court.

A. Respondents Fail To Distinguish Petitioners' Authorities

The Petition draws support from this Court's due process decisions for the proposition that the State may not arbitrarily

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[2] Rejecting the same arguments advanced here, the Florida Supreme Court found that the State could "proceed independently with its new cause of action" as to "payments made after the effective date of the 1994 Act," but that its cause of action prior to that date was limited to the "traditional subrogation action." (30a) The 1990 Amendments were designed to give the State priority over other creditors but, unlike the 1994 Amendments, did not alter the rules governing the liability of third parties.

abrogate affirmative defenses. Additional decisions arising from a number of constitutional provisions show that self-dealing by the State is subject to close scrutiny. By contrast, the State can find no support from this Court's precedents to support its self-serving abrogation of defenses.[3]

Nor can the State distinguish the authorities demonstrating the unconstitutionality of its arbitrary action. The State pretends that the only cases relied upon by Petitioners arose under the Contract Clause. (Opp'n at 21-22.) To the contrary, various decisions based on the Due Process Clause (Pet. at 12-14), the Excessive Fines Clause (Pet. at 12) and other provisions, including the Contract Clause, all confirm that state self-help remedies are subject to rigorous scrutiny. Nor are the Contract Clause cases so easily dismissed: the State's "reimbursement" action—which involves collection of money, not regulation—is more akin to a contractual remedy than any exercise of the "police power." (Opp'n at 21 n.10.)[4]

B. The Amendments Establish a Special, and Arbitrary, Rule in Favor of the State

The State argues that the statute does *not* in fact establish special rules applicable only to the State. (Opp'n at 14-15, 19-20.) That argument blinks at reality. If it were really so, the

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[3] The few cases relied upon by the State that concern constitutional issues are not pertinent. Even if it were true, the fact that, under some circumstances, "a legislature is free to abolish affirmative defenses and create new liabilities without violating due process," (Opp'n at 12), does not stand for the proposition that the State may create different (and more favorable) rules for itself than for any other litigant. On the contrary, the authorities cited by the State recognize that abrogation of defenses is unconstitutional if it is "arbitrary or irrational." *Martinez* v. *California*, 444 U.S. 277, 282 (1980).

[4] Given the "line [that] has to be drawn . . . between regulatory legislation that is relatively free of government self interest . . . [and] statutes tainted by a governmental object of self-relief," *United States* v. *Winstar Corp.*, 116 S. Ct. 2432, 2465 (1996), it is quite evident on what side of the line the Florida statute falls. As one prominent commentator has noted, "the Court seems correct in stressing the heightened 'need for judicial oversight when the State's self-interest is at stake . . .' " Laurence H. Tribe, *American Constitutional Law*, § 9-11, at 620 (2d Ed. 1988).

Florida Legislature need not have bothered to pass the Amendments creating the new cause of action. Plainly, Florida law does not generally permit a volunteer to bypass affirmative defenses by providing assistance to an injured party and then suing those allegedly responsible for the injury.[5]

Indeed, a Florida court applying the Supreme Court's ruling has already rejected such novel common law theories as applied to State reimbursement lawsuits. *State of Florida* v. *American Tobacco Co.*, No. CL95-1466AH (Fla. Cir. Ct., 15th Jud. Cir. Sept. 16, 1996) (order dismissing common law damage claims in tobacco Medicaid reimbursement lawsuit). Thus, the State's reliance upon various common law and statutory remedies supposedly exempting "innocent third parties" from affirmative defenses is inapposite. Such theories plainly do not support the State of Florida's ability to pursue the claims covered by the Act.

More fundamentally, the State's untested claim of "faultlessness" simply illustrates the constitutional infirmity of the Amendments. Under the State's interpretation (Opp'n at 14), the Amendments declare it "faultless" by fiat, notwithstanding the State's actual conduct, including, for example, the massive excise tax revenues it has long derived from the sale of tobacco products. By arguing that the Amendments abrogate *all* affirmative defenses—whether derivative or direct—the State would thus create an *irrebuttable presumption* of faultlessness for both itself and the recipients on whose behalf it makes Medicaid payments. Such "[a] statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause." *Western & A.R.R.* v. *Henderson*, 279 U.S. 639, 642 (1929).

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[5] Any implication that the federal Medicaid statute supports this self-help legislation (Opp'n at 2) is frivolous. Federal law makes clear that Congress expected states to fulfill their obligations to "seek reimbursement" from third parties by way of traditional subrogation actions. 42 U.S.C. § 1396a(a)(25) (1994); 42 C.F.R. §§ 433.137(a), 433.145-46(a) (1996).

The State can articulate no reasoned basis for treating its own Medicaid reimbursement lawsuits differently from typical insurance subrogation actions. The only justification identified in the decision below or the opposition brief is the State's desire to create a new "funding option." (Opp'n at 10, 16.) Of course the mere desire to increase State revenues is a limitless and unprincipled justification; that desire is customarily satisfied through the taxing power, rather than manipulation of the laws governing civil liability. (Pet. at 13.) Likewise, any suggestion that the State may abolish affirmative defenses because an obligation to pay Medicaid expenses is "imposed by law or statute," (Opp'n at 17), ignores the State's voluntary participation in Medicaid. In any event, the courts have repeatedly held that the negligence of the injured party *is* a defense to an indemnification action by a person statutorily obligated to pay the injured person's expenses.[6]

The additional common law authorities cited in the opposition brief bear no relation to the State's claims. The indemnity and restitution cases (Opp'n at 19-20) involved neither self-dealing by a state nor any constitutional analysis at all. Moreover, even the few jurisdictions which hold that certain personal "defenses," such as spousal immunity, do not apply to indemnity claims, *unanimously* hold that the fault of the injured party is a valid defense against such claims.[7]

The Worker's Compensation cases (Opp'n at 20) merely limit the scope of employers' statutory immunity from suit, holding that the statutes do not overcome the common law

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[6] *See, e.g., Brandt* v. *Phillips Petroleum Co.*, 511 So.2d 1070, 1072-73 (Fla. Dist. Ct. App. 1987) (reducing employer's recovery of workmen's compensation benefits from third-party by employee's comparative negligence); *Finney* v. *Manpower, Inc.*, 177 Cal. Rptr. 74 (Cal. Ct. App. 1981); *Regal Steel, Inc.* v. *Farmington Ready Mix, Inc.*, 414 A.2d 816 (Conn. Super. Ct. 1980).

[7] *Compare City of Coral Gables* v. *Prats*, 502 So. 2d 969, 972 (Fla. Dist. Ct. App. 1987) (reducing plaintiff's loss of consortium award against third party tortfeasor because of spouse's comparative negligence) *with Joseph* v. *Quest*, 414 So. 2d 1063, 1064-65 (Fla. 1982) (cited at Opp'n 20 n.7); *see also Crane* v. *Exxon Corp.*, 613 So. 2d 214, 227 (La. Ct. App. 1992); *Filosa* v. *Courtois Sand & Gravel Co.*, 590 A.2d 100, 102-04 (R.I. 1991).

rule that third party tortfeasors liable to injured employees can obtain indemnity from negligent employers.[8] In such cases, both parties would be liable to the employee under traditional legal principles. Thus, these cases have nothing to do with this case, in which the State seeks to create liability where none previously existed based solely on the State's subsequent payment of Medicaid benefits. Moreover, as with other indemnity claims, contributory (or comparative) negligence of the employee continues to be a defense in such indemnification actions.[9] More fundamentally, none of these cases make the availability of a defense turn on whether suit has been initiated by the state for its own benefit.

The State's reference to the law of joint and several liability is particularly puzzling. It overlooks the elementary point that the putative "least culpable defendant" required to pay an entire judgment has a right to secure contribution from joint tortfeasors. Under the statute, however, a manufacturer is provided no such right against a culpable Medicaid recipient.[10] Nor is the State's claim for *reimbursement* for Medicaid payments to negligent recipients even remotely comparable to a private party's *damage* claim against joint tortfeasors.

C. There Is No Justification for the State's Special Dealing on Its Own Behalf

As noted, the only justification identified by the State to support its self-dealing—its desire to increase revenues—is

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[8] Moreover, the "great majority" of jurisdictions reject the position relied upon by the State. Arthur Larson, 2B *Workmen's Compensation Law* §§ 76.20, 76.81 (1996) (over 30 states prohibit such indemnity suits against employers).

[9] *See, e.g., J. J. Simmons Co.* v. *Firestone Tire & Rubber Co.*, 108 Ill. 2d 106, 483 N.E.2d 273, 278 (1985); *Regal Steel, Inc.* v. *Farmington Ready Mix, Inc.*, 414 A.2d 816 (Conn. Super. Ct. 1980).

[10] A Florida tort defendant subject to joint and several liability may join other alleged tortfeasors as defendants. Fla. R. Civ. P. 1.180. The Amendments, by contrast, expressly *forbid* participation by individual Medicaid recipients in omnibus actions brought by the State. Moreover, Florida has repealed the law of joint and several liability with respect to most noneconomic injuries. Fla. Stat. § 768.81(3).

arbitrary as a matter of law. Likewise, the State's contention that the police power, the power to tax, and the power of eminent domain support a generalized principle of unfettered state power to legislate in its own favor (Opp'n at 21-22) proves too much. This case involves neither the police power (the State is not regulating cigarettes or any other product but merely collecting "reimbursement"); nor the taxing power (rather than exercise the taxing power, the State violates due process by disguising a *de facto* tax in the garb of a lawsuit); nor the power of eminent domain (assuming that the abrogation of defenses is a taking for a "public purpose," the State makes no pretense of providing "just compensation"). If anything, the existence of these discrete, but inapplicable, state powers weighs heavily *against* an implied generalized power to act arbitrarily in self interest.

To the extent that the State attempts to justify its statute with baseless rhetoric against tobacco companies (Opp'n at 11), it ignores the fact that nothing in the Act limits it to tobacco industry cases. On its face, the Act permits the State to obtain reimbursement from *any* "liable third party"—irrespective of the industry involved. In any event, the State's emotional appeal is legally irrelevant: the statute would be equally unconstitutional even if it were limited to tobacco reimbursement cases. And any implicit promise that the statute will be selectively enforced is hardly a defense of its constitutionality.

Nor do the cases involving the Federal Medical Care Recovery Act, 42 U.S.C. § 2651 (1994), support the State's position. Contrary to the State's suggestion (Opp'n at 19-20), the weight of authority is that defenses such as contributory negligence *can* be asserted by an alleged tortfeasor against the government. *See, e.g., United States* v. *Housing Auth. of Bremerton*, 415 F.2d 239, 243 (9th Cir. 1969) ("Where the injured party is himself negligent, and where under state law that contributory negligence absolves the third person from liability, then the United States cannot recover from that third

person.").[11] Indeed, Respondents omit from their quotation of the federal statute that language which establishes that the government's independent right of recovery "is 'subrogated' to the extent that it is subject to any substantive state defenses which would negate the requirement that the injury arise 'under circumstances creating a tort liability upon some third person.' " *United States* v. *Fort Benning Rifle & Pistol Club,* 387 F.2d 884, 887 (5th Cir. 1967) (quoting Medical Care Recovery Act). Furthermore, none of the Medical Care Recovery Act cases addresses the constitutional implications of abrogating affirmative defenses in favor of a state.

III. REVIEW OF THE PETITION IS IMPORTANT TO RESOLVE AN IMPORTANT ISSUE OF FEDERAL LAW

The issue raised by the Petition has never been definitively addressed or resolved by this Court. However, as noted in the Petition, substantial authority interpreting the Due Process Clause, supported by analogous authority under the Contract Clause and other constitutional provisions, demonstrates that such self-dealing is unconstitutionally arbitrary. One can imagine no better case than this one for reaffirming this basic due process principle. Here the State, by fiat, contends that it may insulate itself—and itself alone—from all possible affirmative defenses from all possible defendants whenever the allegedly injured parties' medical bills were paid by Medicaid. As the dissent below noted:

> A law that presumes to measure the liability of a party based on such a consideration is completely arbitrary and violates due process. Whether a claim is Medicaid-eligible has no more relevance in measuring

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[11] The appeals court decision which Respondents cite for a contrary position—*Health Ass'n of Am., Inc.* v. *Shalala,* 23 F.3d 412, 419 (D.C. Cir. 1994)—did not even concern the Medical Care Recovery Act and was merely characterizing a district court decision. That district court decision recognized that its holding was in conflict with the only Court of Appeals decision to have addressed the issue. *United States* v. *Theriaque,* 674 F. Supp. 395, 400 n.5 (D. Mass. 1987).

> whether a party may raise an affirmative defense than the question of whether [the injured party] has brown or blonde hair.

(38a).

As a final note, the State asserts that "[r]eview should also be denied because petitioners have brought a facial challenge to the Amendments." (Opp'n at 22.) The difference between "facial" and "as applied" is ephemeral in this case. Respondents fail to suggest a single scenario in which the Amendments could be applied consistent with due process. In fact, there is no set of circumstances under which the Amendments are valid. Furthermore, there is no rule prohibiting review of facially unconstitutional statutes. *See, e.g., Aptheker* v. *Secretary of State,* 378 U.S. 500, 514 (1964) (striking down as unconstitutional on its face a statute violating the Fifth Amendment). Indeed, the two cases cited by the State (Opp'n at 22) *granted* review to consider the facial constitutionality of the statutes at issue.

CONCLUSION

For these reasons, and the reasons discussed in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

MELVIN SPAETH
Counsel of Record
MURRAY R. GARNICK
DAVID S. EGGERT
STACY J. POLLOCK
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000

Of Counsel:

ARNOLD & PORTER
Washington, D.C.

CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A.
Tallahassee, Florida

F. TOWNSEND HAWKES
500 First Florida Bank Tower
215 South Monroe Street
Post Office Box Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Petitioner, Philip Morris, Inc.

JODI CHASE, ESQ.
Tallahassee, Florida

JODI CHASE, ESQ.
General Counsel
516 N. Adams Street
Tallahassee, Florida 32302
(904) 224-7173

Attorney for Petitioner, Associated Industries of Florida, Inc.

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